United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE

SECOND JUDICIAL CIRCUIT

Docket No. 74-1326

~~T-3094~~

74-1326

JERE BISHOP, HARVEY BLOW, JOHN KASPER, MARVIN GREGORY, WILLIAM MAYER and RICHARD PROVOST, On behalf of themselves and all others similarly situated, Plaintiffs-Appellants

vs.

KENT R. STONEMAN, Commissioner of Corrections of the State of Vermont; and JULIUS V. MOEYKENS, Warden, Vermont State Prison, Defendants-Appelles

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF OF PLAINTIFFS-APPELLANTS

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I. Issue Presented for Review

Did the District Court Err in Dismissing the Complaint for Failure to State a Claim, Where the Complaint Alleged that Plaintiff Prisoners Were Subject to Cruel and Unusual Punishment by Reason of Deliberate Indifference to Requests for Essential Medical Treatment?

II. Statement of the Case

The complaint in this case was originally brought by six prisoners as a civil rights action in which they sought to represent all persons similarly situated. On June 4, 1973, Judge Coffrin approved the forma pauperis petitions of only three of the six, on grounds that the other plaintiffs (Blow, Gregory and Provost) were no longer incarcerated and therefore lacked standing to sue. The complaint of the remaining plaintiffs was accordingly filed.

On June 26 the defendants moved to dismiss the complaint for failure to state a claim. Hearing was held on this motion on September 20. On October 2, Joseph DiLaura moved to intervene in the action. Hearing on his motion was held October 30. On December 31 the Court entered its opinion and order denying the motion to intervene and granting defendants' motion to dismiss for failure to state a claim. Plaintiffs filed their notice of appeal to this Court on January 14.

The complaint alleges that plaintiffs, who were prisoners at the Vermont State Prison at Windsor, Vermont, were subjected to cruel and unusual punishment by reason of the fact that the

prison denied them adequate medical care. The plaintiffs allege, basically, that they and other prisoners have been seriously ill but have not been permitted to see a doctor until long periods of time have gone by. The reason for this problem, they state, is that the prison employs only one doctor, who lacks adequate time to attend to all of the medical complaints made. (Complaint at paragraphs 10-12; A-3). Moreover, other members of the prison staff are deliberately indifferent to plaintiffs' medical problems and take no other steps to secure medical care. (Paragraphs 13-14 id.).

The complaint further alleges specific examples of these general misdeeds as they apply to the plaintiffs. Plaintiff Bishop asked to see the prison doctor for six months about back problems before he was permitted to do so. Finally he obtained an X-ray but was never told the results. (paragraphs 16-17; A-4).

Plaintiff Blow waited one week after his request to see the doctor about a needed orthopedic shoe. (paragraph 18 id.). When the prescribed shoe subsequently proved defective, however, he was not permitted to see the doctor at all. (paragraph 20 id.). Thereafter he slipped and injured his crippled leg, but did not see the doctor for six days. (paragraph 24; A-5). Although the doctor recommended an operation, Blow was not afforded one. (paragraph 25 id.).

Plaintiff Kasper suffered severe weight losses, apparently because of massive liver damage, but could not see the doctor for three weeks after request. (paragraphs 26-28 id.).

Plaintiff Gregory was unable to see the doctor for three days after becoming ill, and did so only after he began to vomit blood. (paragraphs 30-31; A-6).

Plaintiff Mayer was unable to see the doctor for ten days after injuring his shoulder. (paragraph 32 id.).

Plaintiff Provost similarly was able to see the doctor only at five day intervals, even after becoming seriously ill (paragraphs 33-37; A-5-6). He was ill, apparently with hepatitis, from December, 1972 until February, 1973 before he received any treatment other than vitamins. During this time he had to be quarantined, but he received no treatment.

The plaintiffs also filed an affidavit with the Court on July 11 alleging that Larry Ellison, a prisoner, had complained of severe stomach pains for a week but was not allowed to see a doctor. Finally he had to be taken to a hospital where he was operated on by a hospital doctor for gangrene of the appendix. The operating doctor stated that he would have died if the operation were delayed for thirty minutes longer.

Similarly, intervening plaintiff Joseph DiLaura alleged that he was unable to obtain treatment for recurring symptoms of malaria until an attorney interceded for him. (Intervening Complaint of Joseph DiLaura; A-10-22).

On July 6, approximately a month after the complaint was filed, plaintiffs filed 103 interrogatories which sought detailed information on the amount of time the prison doctor was available, the training which had been afforded the non-

professional medical staff at the prison, and other facts which would disclose the extent of the prison medical treatment system's deficiencies.

III. Argument

A. The Court Below Used the Wrong Standard To Determine Whether Plaintiffs Stated A Claim of Cruel and Unusual Punishment

The court below enunciated two tests for judging a claim of cruel and unusual punishment and required the plaintiffs to meet both tests. The first is that defendants must have, according to the complaint, demonstrated 'deliberate indifference to essential medical needs' of the plaintiffs. The second test requires that, in addition to the first, the plaintiffs must show conduct by defendants which is "barbarous" or shocking to the conscience." Plaintiffs submit that only the first test needs to be met, and that deliberate indifference to essential medical needs is per se barbarous and shocking.

Although the court's opinion is somewhat confusingly organized, both tests clearly appear. Near the end of the opinion, the court does recognize that "a claim of deliberate indifference by prison authorities is sufficient to support a section 1983 violation.' Appendix at 28. However, the court elsewhere in the opinion requires that 'the complaint must suggest some 'conduct that shocks the conscience' or some 'barbarous act' and 'mere negligence in giving or failing to supply medical treatment alone will not suffice.'' Appendix

at 26. The court then proceed to consider the individual allegations of nonfeasance by defendants and to "reach the conclusion, necessarily subjective, that the alleged actions of the defendants at the most rise no higher than the level of negligence in providing or failing to provide adequate medical treatment to the named prisoners and the defendants' conduct cannot be considered so barbarous or conscience-shocking in nature as would sustain an independent action under section 1983 for each alleged incident." Appendix at 27. The court then considered whether the total of the allegations "may not in fact be greater than the sum of its parts" and held that it was not. Id. at 27-28.

Plaintiffs submit that the court should not have required any proof of conduct other than deliberate indifference by prison authorities to essential medical needs. The leading case on the point in this Circuit is Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972). There the court, per Mansfield, J. stated (at 254):

> Corby also claims that he was "denied adequate medical attention in regards to a serious nasal problem which was brought to the attention of defendant Conboy." Allegations of mere negligence in the treatment of a prisoner's physical condition, or claims based on differences of opinion over matters of medical judgment, fail to rise to the level of a § 1983 violation. See United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970); Church v. Hegstrom, 416 F.2d 449 (2d Cir. 1969). However, a charge of deliberate indifference by prison authorities to a prisoner's request for essential medical treatment is sufficient to state a claim. See Martinez v. Mancusi, 443 F.2d 921 (2d Cir.

> 1970). The complaint, though devoid of details as to the nature of plaintiff's nasal disorder, does recite that the problem was serious and that no remedial action was taken by the authorities despite their awareness of it. Although the claim is border-line, particularly in view of plaintiff's admission in his amended complaint that subsequent to the filing of his original complaint he 'was called out of his cell and told he was going to see the prison doctor,' we believe that it is sufficient and that plaintiff should have been afforded an opportunity to substantiate it.

Similarly, in Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), the court held that a complaint stated a cause of action where defendants' conduct

> was more than mere negligence or poor medical judgment; it is charged to have been deliberate indifference to, and defiance of, explicit medical instructions, resulting in serious and obvious injuries.

Those cases cited by the court in support of a test requiring allegations of "shocking" or "barbarous" conduct in fact require no more than the two cases quoted above. In United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970), the court rejected a claim which essentially disputed the doctor's judgment in rendering the type of treatment which he did. However, the court observed that where relief can be granted, the conduct concerned consists of 'wilful refusal to treat a known ailment, resulting in considerable pain and injury, and not the mere exercise of faulty judgment.' Id. at 867.

Similarly, Church v. Hegstrom, 416 F.2d 449 (2d Cir. 1969), a case in which the court upheld a motion to dismiss,

has been described by the Martinez court, supra, as a case where

> (t)here was no allegation of 'severe and obvious injuries," and no allegation "that any of the defendants knew that treatment was required for the preservation of Church's life, that Church ever requested such treatment, or even that any defendant was aware of his condition."

443 F.2d at 923. The Church court, per Lumbard, J., did engage in a dictum requiring a stronger test which has clearly been rejected in the later cases. At 450 the court stated, 'This complaint, even as amended, would allege only the defendants knew of Church's illness and intentionally stood by, doing nothing. Such an allegation fails to set forth any facts sufficient to bring it within the patterns of conduct for which relief may be provided under § 1983." This language is clearly in conflict with the later opinions which state that deliberate indifference to requests for essential medical treatment does give rise to a cause of action.

Again, in Startz v. Cullen, 468 F.2d 560 (2d Cir. 1970) the Second Circuit has referred to a proper cause of action in this area as arising from

> . . . the reckless failure to inform themselves of a prisoner's medical needs which we held, in Martinez v. Mancusi, supra, 442 F.2d at 924, to be the equivalent of intentionally inflicted harm. Compare Prosser, Torts § 8 (1971 ed.).

Accordingly, plaintiffs urge that the court below acted improperly when it dismissed the complaint in part because "the defendants' conduct cannot be considered so barbarous or conscience-shocking in nature as would sustain an independent action under section 1983 for each alleged incident.' The

court should have limited its examination to the question whether there was a demonstration of deliberate indifference to the plaintiffs' essential medical needs. As set forth below, the court further erred in holding that the complaint did not state a claim under this second test.

B. The District Court Erroneously Held that Plaintiffs' Complaint Failed To State A Claim that Defendants Were Deliberately Indifferent to Plaintiffs' Essential Medical Needs

The complaint in this case clearly makes a claim of "deliberate indifference by prison authorities to a prisoner's request for essential medical treatment. ...", Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972). Indeed, paragraph 14 of plaintiffs' complaint makes this allegation verbatim by stating, "The defendants are deliberately indifferent to the Plaintiffs' requests for essential medical treatment." Further allegations in the complaint state that the medical dispensary and facilities at the prison are grossly inadequate (paragraph 10); that there are too few medical staff attendants (paragraph 11); that the prison's sole contract doctor is unable to spend enough time at the prison to meet the inmates' needs (paragraph 12); and that all of the prison inmates are exposed to inadequate medical diagnosis and care. (paragraph 13).

The thrust of the complaint is therefore that the prison authorities have deliberately created or tolerated a system where they know medical needs cannot be adequately

diagnosed or treated because of inadequate staffing and facilities. The plaintiffs allege that because of this system which defendants know to be inadequate but nonetheless tolerate, plaintiffs are subject to the continuing threat of serious physical harm. The specific incidents alleged in the complaint serve to illustrate the nature of the defective system and the kinds of difficulties which it has already produced.

The lower court, however, held (Appendix at 27) that:

> (I)t is the six specific instances involving the named prisoners (three of whom are plaintiffs) recited in the complaint upon which the instant case must stand or fall. Applying the Second Circuit test to each such "typical incident" we reach the conclusion, necessarily subjective, that the alleged actions of the defendants at the most rise no higher than the level of negligence in providing or failing to provide adequate medical treatment to the named prisoners and the defendants' conduct cannot be considered so barbarous or conscience-shocking in nature as would sustain an independent action under section 1983 for each alleged incident.

The court then concluded, with specific reference to the claim of deliberate indifference (Appendix at 28-29):

> We are unable to find from the specific incidents enumerated in the complaint that there has been a deliberate indifference to the prisoners medical needs. At the most such instances suggest that medical aid and treatment was not rendered to the prisoner as expeditiously as he wished or thought proper but this merely suggests delay by, and not deliberate indifference on the part of, the defendants. Furthermore, there is no allegation in the complaint that the medical treatment when received was improper in the circumstances or that the

> results would have been altered if a different course of treatment had been followed.

Plaintiffs contend that this summary characterization of the complaint is seriously erroneous. First of all, the opinion itself reveals the subjective nature of the court's analysis when it states that the court "cannot conceive "that care at the prison was totally deficient and that the allegations "suggest" mere delay and not deliberate indifference. Appendix at 28-29. Indeed, the court in the passage quoted above labeled its own judgment 'necessarily subjective."

The lower court by making these judgments essentially prejudged plaintiffs' case before evidence could be presented. In Conley v. Gibson, 355 U.S. 41 (1957) the Court held with respect to the test applicable to motions to dismiss for failure to state a claim (at 45-46):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

To the same effect see Gardner v. Toilet Goods Ass'n., 387 U.S. 167, 172 (1967); Scheuer v. Rhodes, 42 U.S.L.W. 4543, 4544 (U.S. Apr. 17, 1974).

Here the complaint unequivocally alleged that the prison administration had created a system which they knew to be inadequate to deal with prisoners' medical needs. The court without entertaining any evidence determined that because some medical care was available, the allegations were necessarily untrue. In effect, the court determined that so long as any

system of medical care at all exists, prison administrators cannot be guilty of knowingly maintaining a totally inadequate medical system. This thesis is obviously false, and the court erred in adopting it. Indeed, in Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972) the court held adequate a complaint which merely alleged that the defendants had deliberately ignored a nasal condition. Certainly the complaint in this case makes no less of a claim of deliberate indifference than did the complaint in Corby.

Secondly, the court below should not have dismissed the complaint simply for a failure to make more specific allegations about the exact way in which the medical services delivery system at the prison operated. Shortly after the complaint was filed, plaintiffs submitted 103 interrogatories seeking detailed information from defendants regarding the number of hours when the doctor was available at the prison, the qualifications of the nonprofessional medical staff, and other information. The court, however, granted defendants' motion to delay response to these interrogatories and then dismissed the complaint. Without this information, plaintiffs were unable to make detailed accurate allegations in the complaint.

In Conley v. Gibson, supra, the court specifically addressed the question of specificity or lack thereof in a complaint, as regards to a motion to dismiss for failure to state a claim. The court stated (at 47-48):

> The respondents also argue that the complaint failed to set forth specific facts to support

> its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim," that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. [Footnote: See, e.g., Rule 12(e)(motion for a more definite statement); Rule 12(f)(motion to strike portions of the pleading); Rule 12(c)(motion for judgment on the pleadings); Rule 16 (pretrial procedure and formulation of issues); Rules 26-37 (depositions and discovery); Rule 56 (motion for summary judgment); Rule 15 (right to amend).]
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> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chem. Co., 303 U.S. 197.

In this case the defendants made no motion for a more definite statement, took no advantage of discovery devices, and did not move for summary judgment. Where a defendant fails to use these devices, he cannot, by means of a motion to dismiss for failure to state a claim, avoid the intendment of the pleadings on grounds that they are too general. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944). As stated in Reed v. Board of Educ., 460 F.2d 824, 826 (8th Cir. 1972):

> "...the system of modern Federal procedure embodied in Federal Rules Civ. Proc. Rule 8, 28 U.S.C.A. requires only that a litigant construct a complaint which truly and accurately reflects the basis upon which he believes he should recover and one which gives fair notice to the party against whom relief is sought. The point of principal importance is that lawsuits no longer are to be routinely disposed of solely on the basis of the phraseology a plaintiff selects in framing his complaint. Instead, discovery, pretrial and summary judgment procedures are the vehicles employed today to achieve prompt disposition of meritless claims."

Similarly, the Supreme Court has held that even general allegations of physical injury arising from improper placement of a prisoner in disciplinary confinement are adequate to prevent the grant of a Rule 12(b)(6) motion. Haines v. Kerner, 404 U.S. 519, 520-21 (1972), citing Conley v. Gibson, supra.

In any event, the specific allegations of medical inadequacy in the instant complaint are at least as well pleaded as those in many other cases where motions to dismiss were denied. In Jones v. Lockhart, 484 F.2d 1192 (8th Cir. 1973) the Eighth Circuit reversed the dismissal of a complaint which alleged that plaintiff sustained a back injury and was refused treatment other than some pills prescribed by a paramedic. The complaint did not divulge whether the plaintiff was eventually seen by a doctor. The court reversed the dismissal citing Corby v. Conboy, supra. The Fourth Circuit in Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) also held that a complaint stated a cause of action where the prisoner generally alleged denial of medical care despite a heart condition.

Similarly in Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972), the Fifth Circuit reversed a dismissal where the plaintiff alleged willful actions of prison officials which (a) improperly required him to do physical work despite a heart condition, (b) refused to give him necessary medication, (c) refused him doctor's care for 13 days in disciplinary segregation, and (d) subjected prisoners to treatment by persons other than licensed doctors. See also Lawrence v. Wainwright, 440 F.2d 379 (5th Cir. 1971)(allegation of abuse of discretion in provision of medical care states a claim); Hutchins v. Alabama, 466 F.2d 502 (5th Cir. 1972)(allegation of lack of medical treatment causing pain and shortening life expectancy states a claim).

The Sixth Circuit has also upheld a claim similar to that at bar. In Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972) the plaintiff alleged that he had complained of a head injury but prison officials had not proffered treatment. The court held that a claim was stated, even though the deliberateness of the defendant's action was only generally alleged, because "where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the deprivation of constitutional due process." Id. at 1076.

In Wood v. Maryland Cas. Co., 322 F.Supp. 436 (W.D. La. 1971) the court upheld a claim that medical treatment had been inordinately delayed, stating that "where as here, there is a claimed failure initially to promptly provide medical

care and a claim of repeated attempts to gain treatment for very serious injuries, we think this constitutes 'exceptional circumstances' which forecloses summary dismissal." Id. at 440.

The above list of cases could be expanded, but it serves without addition to illustrate the fact that courts have generally upheld claims which allege willful indifference to serious medical needs, whether or not the claim specifies exact evidence which will be used to prove the fact of willfullness at trial.

C. The Court Erred in Holding that There Was No Allegation of Serious Harm to Plaintiffs

The lower court's opinion held that serious consequences must be alleged to have resulted from inadequate medical treatment, and that the complaint did not make such allegations except with regard to Harvey Blow, whose forma pauperis complaint had not been filed because he had been released from prison, and whose allegations the court therefore declined to consider. (Appendix at 29).

The court in so holding erred in two important ways. First, unlike many prison medical cases, the thrust of the instant complaint was that all the plaintiffs were subject to the possibility of serious medical harm at all times because they were incarcerated in a system which lacked adequate provision for diagnosis and treatment. Consequently the threat, as

opposed to the reality, of physical harm can legitimately be considered. Thus in Hayes v. Secretary, 455 F.2d 798, 801 (4th Cir. 1972) the Court held:

> It is true that plaintiff has not alleged that brutality or other misconduct has been practiced on him, but he has, in effect, alleged that he is part of an institutional population which must live from day to day under the constant threat of brutality and misconduct. It would seem, therefore, that plaintiff is "injured," is a member of a class which is "injured" and is thus competent to maintain a class action for himself and others similarly situated.

The court goes on to cite other cases also holding that where a plaintiff is subject to a system which realistically threatens him with harm, it is unnecessary that he himself have suffered the harm.

As a consequence of the plaintiffs' standing on this theory to raise the fact of injuries to others, the court below was clearly wrong to restrict its consideration to the allegations of the plaintiffs. In addition to these complaints there was the intervening complaint of Joseph DiLaura and the Affidavit of Larry Ellison. The court explicitly declined to consider the Ellison affidavit, which alleged that gangrene of the appendix and a close brush with death had resulted from inadequate medical care--clearly an instance of serious medical consequences. The court explained this decision in a footnote, Appendix at 32, by stating that such an affidavit would be available on a motion for summary judgment but not with regard to a motion under Rule 12(b)(6). Admittedly Rule 12(b) permits but does not compel a court to accept affidavits in connection with a motion to dismiss for failure to state a claim and to

treat the motion for summary judgment. See generally Advisory Committee Comments on Rule 12(b); 2A J. Moore, Federal Practice P. 12.09. However, the offer of the affidavit in this instance certainly makes the grant of defendant's motion highly questionable, where plaintiffs clearly could have produced the affidavit in opposition to a motion for summary judgment, where the court could have converted the motion into one on summary judgment, and where a ground for dismissal was the lack of sufficiently specific allegations regarding physical injury, which the affidavit would have provided. Plaintiffs therefore submit that the failure to consider the affidavit constituted an abuse of discretion and constitutes grounds for reversal. Cf. Reed v. Board of Educ., 460 F.2d 824, 826 n.1 (8th Cir. 1972) (where the defendant's state of mind is in question, affidavits or depositions (in that case, from defendants) should be taken and motion to dismiss should not be granted).

Second, the complaints of the plaintiffs reveal an adequate amount of serious pain and danger to reveal a condition which can be classified as barbarous or shocking if necessary. These complaints allege back problems, lack of a proper orthopedic shoe causing pain and reinjury of a crippled leg, severe weight loss apparently resulting from cirhossis of the liver, a high temperature and the vomiting of blood eventually requiring hospitalization, a shoulder injury, and a condition apparently amounting to hapatitis, all of which went without treatment for extended periods of time. Surely judicial notice may be taken that pain and discomfort can normally be expected to result from such conditions. Even if

the court need not have considered the affidavit of Larry Ellison regarding his operation upon a gangrenous appendix, the complaints of the plaintiffs make abundantly clear that the lack of adequate medical care which they allege could with time give rise to any variety of extreme medical conditions including death, assuming that any given disease lacked proper care and attention for an extended period of time.

IV. Conclusion

For all of the above reasons plaintiffs submit that they adequately pleaded a claim of cruel and unusual punishment and request this Court to remand for further consideration by the District Court.

Respectfully submitted this 15th day of May, 1974.

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